



LOCKS LAW FIRM

The Curtis Center
601 Walnut Street, Suite 720 East
170 S. Independence Mall West
Philadelphia, Pennsylvania 19106
T 215.893.0100
T 866.LOCKSLAW
F 215.893.3444
lockslaw.com

DAVID D. LANGFITT
dlangfitt@lockslaw.com
215-893-3423

September 12, 2018

Via Email (via Orran L. Brown, Sr., Esquire)

Special Master Wendell Pritchett, Esquire
Office of the Provost
University of Pennsylvania
3501 Sansom Street
Philadelphia, PA 19104

Re: *Coordinated Response to NFL Letter-Objections of June 28 and July 11*

Dear Special Master Pritchett:

Twenty-three retired NFL players, through agreement of their individual counsel, jointly and respectfully submit this coordinated response to the letters the NFL wrote the Special Master on June 28 and July 11.

Introduction and Summary of Argument

Between 2017 and the present, each of the twenty-three retired NFL players received a Qualifying Diagnosis from a Qualified MAF or BAP Physician and, subsequently, a Notice of Monetary Award under the Settlement. The NFL appealed all twenty-three awards and lost. The Special Master held in favor of all twenty-three players on the grounds that the NFL had failed to produce clear and convincing evidence that the diagnosis was wrong. These findings are not appealable under Rule 26 and 31 of the Rules Governing Appeals.

The NFL refused to pay these awards on the purported grounds that the Special Master (a) had not used AAP/AAPC resources "...on appeals turning on critically important medical issues..." and (b) should have referred all twenty-three cases to the AAP for "a re-review of recent appeals that have not yet been paid turning on medical issues for which an AAP member was not consulted." NFL 06/28/2018 Letter at pages 2 and 5. The NFL claimed that it was "always the intent of the Parties" that AAPs and AAPCs review the work of "Qualified MAF physicians." *Id.* at 2.1

In a letter of July 6, Seeger Weiss disagreed, directly cited section 9.8 of the Agreement, and denied this purported "intent of the Parties." In a response, the NFL disputed Seeger's

¹ In most cases, the NFL has delayed payment to the players for many months, even though each of the players complied with the requirements of the Settlement program and received a qualifying diagnosis. Most are unable to work at all, and some are suicidal. The delay jeopardizes their lives, including the lives of dependent family members.

Weiss' good faith recitation of the plain language of the Agreement and stated that Seeger Weiss had engaged "in blatant bad faith." NFL 07/11/18 Letter at 1. Seeger Weiss, however, simply pointed out that the Parties never intended the Agreement to mean something it does not say.

The Court and Special Master have determined that the NFL's letters should be treated as objections. The objection should be overruled for the following reasons:

1. The NFL objection is an attempt to rewrite section 9.8 of the Agreement and Rule 22 of the Rules Governing Appeals, to convert the appeals process into a re-review by the AAP AAPC of BAP and MAF awards, and to usurp the role of the Court and Special Master. This is contrary to section 9.8 and Rule 22, both of which the NFL and Seeger Weiss negotiated and drafted.² Both state that the Court (and by appointment the Special Master) have discretion to consult AAP/AAPC members, but are not compelled to do so. Co-lead counsel and the written Agreement flatly contradict the NFL's position.

2. The purported "technical medical issues" require the expertise of the Special Master, not that of the AAP/AAPC. The Special Master is doing what a juror does at a trial to determine the weight and credibility of the evidence and, sometimes, which doctor is telling the truth. The Special Master is also deciding whether the NFL has marshalled clear and convincing evidence that the diagnosis by a board-certified neurologist the NFL vetted and approved for the MAF and BAP programs is wrong. These factual findings are better placed with the Special Master, an experienced lawyer and judicial officer, not the AAP/AAPC.

3. The NFL's argument is predicated on a false premise. It seeks re-review on the grounds that the Special Master's post-appeal determinations are procedural mistakes subject to an objection under Rule 32 of the Rules Governing Appeals. But the NFL asks that the AAP/AAPC re-review an MAF or BAP diagnosis so it has a separate opportunity to make determinations on "technical medical issues." These are issues of fact, and in each case, the Special Master made a factual determination (like a juror) that the evidence the NFL presented on appeal was inadequate. Those determinations are not subject to appeal under Rule 22, whether or not they allegedly "turn on technical medical issues."

4. In most cases here, the NFL's appeal focused on factual issues regarding the player's functional impairment, whether neuropsychological test scores were sufficient to meet the 1.5 or 2.0 criteria, or whether the date of onset was properly determined by the MAF or BAP physician. In each case, the Special Master held that the MAF/BAP physician was factually correct in the diagnosis, as had the Claims Administrator, and that the NFL had not presented clear and convincing evidence that the diagnosis was wrong. That is similar to the factual finding juries and judges make every day. It is not a legal determination.

5. The NFL's attempt to re-write the Agreement and Rules has nothing to do with a purported desire to pay only valid claims. The NFL is opportunistic and seeks a new system to re-review and second-guess³ MAF/BAP medical decisions on "technical medical issues" and

² It is also contrary to the Agreement's integration clause at section 30.3.

³ The NFL states that "[t]he appeals process is, of course, not intended to second-guess medical

possibly deny awards. This is an attempt by the NFL to re-write the Agreement and Rules for its own financial benefit and to harm players who have gone through the Settlement's requirements and received post-appeal monetary awards. Whether or not the NFL is found to be acting in good faith or bad faith, it should be made to pay interest on the funds withheld and attorney's fees and costs to all attorneys who have spent time responding to the objection.

Argument

The Intent of the Agreement is Clear

The NFL has no basis to argue that the “intent” of section 9.8 of the Settlement Agreement commands the Court or Special Master to consult with AAP members and/or AAPC members on medical issues when ruling on appeals. NFL Letter of 06/28/2018 at 1-2. Regarding review of appeals, the Settlement Agreement states:

The Court will make a determination based upon a showing by the appellant of clear and convincing evidence. The Court *may* be assisted, *in its discretion*, by any member of the Appeal Advisory Panel and/or an Appeals Advisory Panel Consultant. The decision of the Court will be final and binding. Settlement Agreement, Article IX, § 9.8 (emphasis added).

Section 9.8 expressly provides that the Court’s choice is discretionary, and the Court delegated that discretionary authority to the Special Masters. There is no command language or requirement. The same is true in Rule 22 of the Rule Governing Appeals, which states in pertinent part: “The Special Master may be assisted in any Appeal, *in his discretion*, by any member [of the AAP or AAPC].” (Emphasis Added.) The NFL negotiated and agreed to Rule 22 in January 2018, so if it believed something else was intended, it should have said so then. Instead, the NFL disingenuously suggests that Seeger Weiss engaged in “blatant bad faith” for simply citing the plain language of the Agreement and denying the Agreement means something it does not say.

The Agreement also states that the parties agreed that the terms of the Agreement constituted a “fair, reasonable, and adequate resolution” of the disputed claims. *See Settlement Agreement at RECITALS, ¶ K; see also ¶¶ J and L.* This included the discretionary language in section 9.8, which means that the Court (and Special Master by delegation) may in their discretion consult (or not consult) with AAPs and AAPCs with respect to appeals. The Settlement terms do not say that consultation *would* take place.

The Agreement is a well-negotiated arms-length written document supervised by the Court. The respective parties received benefits of their bargain, and those are contained within the plain language of the Agreement, which must be applied and enforced according to its terms. *See Teva Pharmaceutical Industries, Ltd. v. UnitedHealthCare Services, Inc.*, 2018 WL

determinations by qualified physicians...” *See* NFL 06-28-18 letter at 1. This is exactly what the NFL wants, a mandatory process that allows the AAP/AAPC to second-guess, undercut, and reverse MAF/BAP determinations and Special Master post-appeal decisions.

1898911, *6 (E.D.Pa., filed April 20, 2018) (discussing plain meaning and interpretation). That is, the intent of settling parties in a lawsuit is determined by looking to the words of the settlement agreement. *See Teva Pharmaceutical* at *6.

The relevant words of section 9.8 and Rule 22—*i.e.*, “may” and “discretion”—reveal that the Parties intended that the Court and Special Master may, if they choose, consult with AAPs/AAPCs on appeals, but are not compelled to do so. The plain words contradict the NFL’s self-serving argument that the Parties to the Agreement intended otherwise. *See* NFL Letter of 06/28/2018 at 1-2.

The NFL Objection Does Not Establish An Abuse of Discretion by the Special Master

The undersigned assumes that the NFL is posing a procedural objection (not an objection based on a legal finding, which Rule 22 does not permit) based on the Special Master’s decision not to consult the AAP/AAPC on the twenty-three cases. Under F.R.Civ.P 53(f), procedural decisions by the Special Master, such as discretionary consultation with a member of the AAP, are subject to review for abuse of discretion. Under these circumstances, the NFL would have to establish that the Special Master abused his discretion by not choosing to consult with the AAP/AAPC on each of the twenty-three cases. That is a difficult burden of proof, and the NFL has not attempted to meet it. In its objection, the NFL marshaled no evidence that the Special Master abused his discretion by making an incorrect finding on a technical medical issue that he should have referred to the AAP/AAPC. Most often, the Special Master agreed with the MAF/BAP clinicians and found that the NFL’s alleged evidence was insufficient.

Most likely, in each of the twenty-three cases, the NFL presented what it thought at the time was clear and convincing evidence that the diagnosis was wrong. In each case, the Special Master found as a matter fact that the NFL’s evidence, such as it was, was insufficient. The NFL should not be heard now to allege that the Special Master abused his discretion by choosing not to consult the AAP/AAPC, when it did not actually raise this issue within the appeals. The Special Master is more than capable of deciding whether an MAF/BAP diagnosis meets the proper criteria and whether the NFL has marshaled clear and convincing evidence to the contrary.

The Alleged Technical Medical Issues Do Not Require Specialized Knowledge and Are Best Resolved by the Special Master

The NFL should not be concerned about findings of fact by the Special Master, whose experience as a lawyer and judicial officer speaks for itself. The Special Master is far more qualified than the AAP/AAPC to determine whether a diagnosis approved by BrownGreer meets an injury definition under the Agreement, meets the “generally consistent” standard set forth in FAQ 95, or meets any of the requirements under the FAQs the Special Masters and the Court codified as “rules of the road.” Arguably, the AAP/AAPC are not qualified to make these factual determinations in light of the fact that they have no background in determining factual questions in dispute and did not write the “rules of the road.” As a result, the Special Master is

better suited to make these determinations.

On information and belief, most of the AAP/AAPC members have never conducted a clinical evaluation of a retired football player. The MAF and BAP neurologists, however, have conducted extensive examinations of many former players both before and after the Effective Date and understand the MAF/BAP rules and the illnesses afflicting the player population. The NFL is directly involved in vetting and selecting them based on clinical experience and expertise. It has unlimited objections in the MAF selection process and often uses them. As a result, the MAF/BAP physicians are professionals on whom the Special Master, Court, and class members can reasonably rely. They do not need to be subjected to an extra lawyer of mandatory second-guessing by the AAP/AAPC.

In the 23 cases at issue here, the NFL appeals show no special medical issues that would elude the Special Master as the finder of fact. Below are some but not all of cases, provided as examples. There is nothing so arcane that the Special Master cannot determine whether the diagnosis complies and whether the NFL has furnished clear and convincing evidence that the MAF/BAP diagnosis is wrong.

Claimant [REDACTED]

For Claimant [REDACTED], the NFL argued that MAF neurologist and BAP neuropsychologist did not comply testing requirements and the third party statements were untrue based on anecdotal proof of some functional ability in any years earlier. The Special Master found the MAF neurologist furnished a correct diagnosis, and the NFL provided no clear and convincing evidence that it was wrong.

Claimant [REDACTED]

For Claimant [REDACTED], the NFL's appeal argued that the MAF diagnosis failed to establish that the player suffered from dementia that is generally consistent with the criteria for Level 2.0 neurocognitive impairment. The NFL disregarded prior medical records of treating doctors that showed that the player suffered from moderate dementia. The NFL argued that the MAF neurologist and neuropsychologist failed to apply exact BAP criteria, which is contrary to FAQ 95. The Special Master found that the MAF diagnosis was correct and the NFL failed to marshal clear and convincing evidence to the contrary.

Claimant [REDACTED]

For claimant [REDACTED], the NFL argued on appeal that the neuropsychological tests scores were insufficient to meet the Level 2.0 neurocognitive impairment criteria under the "generally consistent" standard for an MAF diagnosis. The Special Master found as a matter of fact that the NFL did not provide clear and convincing evidence that the diagnosis was wrong.

Claimant [REDACTED]

For Claimant [REDACTED], the NFL's appeal raised questions about the MAF diagnosis of Level 2 neurocognitive impairment without sound information to back up the argument. The

NFL failed in large part, because the MAF neurologist made the diagnosis over several months (August 30, 2017 through October 9, 2017) that included an assessment of the player's condition and a battery of tests. The MAF neurologist produced a report on the player's life history, which included episodes of alcoholism, violent attacks, outbursts, road rage, and financial ruin. The NFL used photographs pulled off the internet to argue the diagnosis was incorrect. The Special Master found that the NFL failed to furnish clear and convincing evidence that the diagnosis was wrong.

Claimant [REDACTED]

For Claimant [REDACTED], the NFL argued that as a factual matter the conclusions of the BAP providers who rendered the diagnosis of 1.5 neurocognitive impairment were insufficient to support the diagnosis. The NFL claimed that the examining neurologist failed to conclude that the player had "moderate cognitive impairment," even though the neurologist clearly stated those exact words in the report. The NFL argued that the BAP neuropsychologist failed to apply guidelines relating to test results, even though the neuropsychologist followed the exact guidelines set forth in the Settlement Agreement. The Special Master found as a factual matter that the BAP providers rendered the diagnosis properly, and the NFL failed to provide clear and convincing evidence that such diagnosis was wrong.

Claimant [REDACTED]

For Claimant [REDACTED], the NFL disputed the player's medical history and neuropsychological test results and whether the MAF diagnosis was precisely what the BAP required, thereby ignoring FAQ 95. The NFL cited parts of the medical record but ignored 400 pages of records that documented concussion symptoms and cognitive deficits the MAF neurologist considered in rendering a diagnosis of 1.5 Neurocognitive Impairment. The NFL interjected its own method for re-calculating the player's premorbid IQ to question test results, but the BAP neuropsychologist refuted the factual issues the NFL raised. The Special Master denied the appeal and ruled that the NFL failed to produce clear and convincing that the Qualifying Diagnosis was wrong. None of the issues required any technical medical expertise.

Claimant [REDACTED]

For example, regarding the post-appeal for Claimant [REDACTED], a pre-effective date claim, the only issue involved was the date on which the player was diagnosed, not any technical medical issue. The AAP accepted the date of diagnosis based on a sworn statement from the examining neurologist. The NFL appealed solely on the grounds that the date of diagnosis was later in time. There was no technical medical issue the AAP/AAPC could determine the Special master could not. In fact, based on the FAQs the Special Masters helped draft, the Court and Special Mater were far more qualified than the AAP/AAPC to make this factual determination.

Claimant [REDACTED]

In the post-appeal award for claimant [REDACTED], the NFL argued (as a factual matter)

that the MAF neurologist diagnosis failed to establish that the player suffered from dementia that is generally consistent with the criteria for 1.5 neurocognitive impairment. The NFL cherry-picked parts of the medical records and argued, for example, that the player (in his self-report) did not appear concerned about his cognitive functioning, denied having severe memory problems, and was not aware of impairment in his day-to-day activities. This was a passing attempt to re-argue existing medical records. The NFL marshaled no evidence, just argument. The MAF physician obviously disagreed, particularly in light of other evidence and the fact that some functionality does not preclude the diagnosis. The Special Master determined as a factual matter that the NFL's arguments were not clear and convincing evidence that the diagnosis was wrong, and the record on appeal failed to raise any complex medical issues requiring consultation with the AAP/AAPC.

Claimant [REDACTED]

As to Claimant [REDACTED], the NFL argued on appeal that the MAF clinicians' testing protocol was not "generally consistent" with the BAP protocol, because they utilized two tests for assessment of impairment in the Language domain that the BAP protocol uses for assessment of Executive Functioning. The Special Master concluded that clinicians complied with the Settlement criteria, and the NFL failed to provide clear and convincing evidence that the diagnosis was wrong.

Claimant [REDACTED]

For Claimant [REDACTED], the NFL appealed the monetary award and lost. The issue on appeal was exceptionally narrow. The NFL claimed that the MAF neurocognitive impairment diagnosis did not meet criteria, because the required corroborating third party affidavit came from a girlfriend at the time who later married the claimant after the date of diagnosis. The Special Master denied the appeal. Nothing raised by the NFL's appeal involved arcane and technical medical issues the Special Master could not address.

Claimant [REDACTED]

For Claimant [REDACTED], the issues on the NFL's appeal were (a) whether pre-existing neuropsychological records from 2016 that were superseded by updated test results in 2018 by a board-certified BAP neuropsychologist had any relevance at all; and (b) whether a staged three minute filmed interview of the player was clear and convincing evidence that the player did not have 2.0 neurocognitive impairment. The MAF physician never relied on the 2016 tests, so they were irrelevant. The 2018 test results were fully valid, and all other evidence was completely consistent with the diagnosis. The Special Master found as a matter of fact that the NFL did not provide clear and convincing evidence that the diagnosis was wrong. The Special Master did not need the AAP/AAPC to arrive at this finding.

Claimant [REDACTED]

For Claimant [REDACTED], the issues on the NFL's appeal was whether corroborating documentation regarding loss of employment was sufficient and whether the

neuropsychological test results met the “generally consistent” standard as that is defined in FAQ 94. The Special Master found as a matter of fact that the MAF neurologist furnished a correct diagnosis, and the NFL provided no clear and convincing evidence that it was wrong. There was no technical medical issue the Special Master was not qualified to determine.

Claimant [REDACTED]

For Claimant [REDACTED], the issue on the NFL’s appeal was whether pre-existing neurological records allowed the MAF physician to set the date of neurocognitive impairment at the date when the player received full and complete disability from social security and the NFL Benefits Plans. The MAF physician determined that the date of onset was at the earlier date and was guided by both the MAF rules provided by BrownGreer and FAQ 93 provided by the Special Masters. The Special Master found as a matter of fact that the MAF neurologist furnished a correct diagnosis, including the date of onset, and the NFL provided no clear and convincing evidence that it was wrong. Again, there were no technical medical issue the Special Master was not qualified to determine.

Claimant [REDACTED]

For Claimant [REDACTED], the claim was a pre-effective date claim, and the AAP/AAPC approved it. The NFL appealed and lost. There is, therefore, no reason for a re-review by the AAP/AAPC, and the NFL has no grounds to ask for a re-review.

Claimant [REDACTED]

For Claimant [REDACTED], the NFL appeal failed to raise a technical medical issue that the Special Master, in the role of factfinder, could not determine. The NFL argued that the evidence on which the qualifying diagnosis was based was flawed, but failed to produce any evidence that the diagnosis was wrong. The Special Master, however, made a factual determination that the NFL failed to meet their burden of providing clear and convincing evidence that the neurocognitive impairment diagnosis was wrong. The Special Master ruled that this determination was factual in nature, final and binding.

Claimant [REDACTED]

For Claimant [REDACTED], the NFL argued a factual dispute on appeal. The NFL claimed the player’s test scores did not meet required criteria and that the scores did not establish that player suffers from early dementia. The Special Master found that the diagnosis was correct and that the NFL failed to meet its burden of providing clear and convincing evidence that the diagnosis was wrong. The Special Master ruled that the determination was factual in nature, final and binding.

Claimant [REDACTED]

For Claimant [REDACTED], the NFL’s appeal argued against the conclusions of the MAF providers who diagnosed the player with level 2.0 neurocognitive impairment. The NFL argued,

as a factual matter, that the player was not sufficiently functionally impaired to meet the requirements. The MAF clinicians argued otherwise. The NFL marshaled no evidence, just argument, and the Special Master determined that the NFL's arguments were not clear and convincing evidence that the diagnosis was wrong.

Claimant [REDACTED]

For Claimant [REDACTED], the NFL's appeal argued, again, that the Level 2 neurocognitive impairment diagnosis was not consistent with the functional impairment shown by the player. The NFL claimed that the MAF neurologist failed to assess the Claimant in several CDR categories and publicly available information proved that the player did not have the required functional impairment. The NFL also argued that the MAF neurologist failed to determine whether the player's functional decline was caused by non-cognitive factors. The Special Master determined that the NFL's arguments and evidence were neither clear nor convincing and did not establish that the diagnosis was wrong.

Claimant [REDACTED]

For Claimant [REDACTED], the NFL appeal failed to raise a technical medical issue that the Special Master, in the role of factfinder, could not determine. The NFL argued – once again – that the evidence of functional impairment did not meet criteria under the generally consistent standard and the injury definition for Level 2 neurocognitive impairment. The Special Master made a factual determination otherwise and found that that the NFL failed to provide clear and convincing evidence diagnosis was wrong.

The NFL Seeks to Second-Guess MAF/UAP Determinations and Usurp the Role of the Special Master

The NFL is trying to re-write the Agreement for private pecuniary advantage. The money it must pay under this uncapped Agreement is far greater than the relatively meager sum the NFL estimated it would have to pay before the Court lifted the cap. To date, the NFL is liable to pay approximately \$535 million in monetary awards, which is nearly twice it thought it would pay within the first eighteen months of the Settlement. Not until ten years following the Effective Date did the NFL expect to owe \$535 million in monetary awards to the retired players.

Thus, the NFL's argument is disingenuous. There is no secret unwritten "intent" of the Parties, and the NFL does not want to check MAF/BAP awards so that it pays only valid claims. It wants to re-write section 9.8 and Rule 22 to create a new layer of mandatory re-review in the hope that the AAP/AAPC will reverse awards the Claims Administrator and Special Master have determined are valid. The un-founded re-write would take from the hands of the Court and Special Master all or a part the appeal determination and place it into the anonymous hands of AAP or AAPC members, many of whom, on information and belief, have never seen or examined an NFL player in his or her career.

The NFL's proposed re-write would also undercut and second-guess the work of

carefully selected and well-qualified MAF/BAP physicians who are clinical experts with considerable experience evaluating former NFL players. The work of these physicians does not merit re-review from neurologists with little or no experience with this population in a clinical setting.

From the beginning, the League has sought to litigate, delay, and audit as many claims as possible to keep its liability close to the relatively small monetary sum it would have paid had the Court not lifted the cap. By way of example only, the NFL sought from the beginning to redefine the phrase “generally consistent” to become “generally equivalent” as that phrase applies to an MAF diagnosis and the standard of review for a pre-effective date claim. To this day, the NFL continues to attempt to re-define that phrase, even though the Court and Special Masters addressed that subject in FAQ 95. This and other tactics belie the NFL’s statement in its June 28 letter that it does not seek an appeals process that second-guesses determinations by qualified physicians. That is exactly what it wants, a process so filled with layers of review that a well-supported diagnosis by a carefully selected and well-qualified neurologist has a substantial chance of receiving a denial based on “technical medical issues” raised by AAP/AAPC members.

If the NFL succeeds, it will have a serious consequence to the Settlement. The program will become even more onerous than it already is, and the NFL’s re-write will drive away physicians, neuropsychologists, counsel and players, because the program will have the markings of a system rigged against the players and designed by and for the NFL. Undersigned counsel, who represents substantially more than one thousand players registered in the program, respectfully requests that the Special Master overrule the NFL objection as unsound and not founded on fact, and contrary to the Agreement and the Rules Governing Appeals.

Conclusion

For all of the foregoing reasons, counsel to the twenty-three Claimants to whom the NFL has refused payment pay respectfully request that the Special Master overrule the NFL’s objection and direct the Claims Administrator to pay the Claimants on an expedited basis. The twenty-three Claimants also request that the Court require the NFL to pay interest on the funds withheld and attorney’s fees and costs to all attorneys, including co-lead counsel, who have spent time and effort responding to the NFL’s objection. Those costs and attorney’s fees should not be taken from the common benefit fund, which is set aside for other purposes.

Respectfully submitted,



David D. Langfitt
By permission from and on behalf of the Twenty-
Three Claimants

DDLmbl

Cc: All Counsel to the Twenty-Three Claimants (via Email)
Hon. Anita B. Brody (via Orran Brown, Sr., Esquire)
Special Master Joanne Verrier (via Orran Brown, Sr., Esquire)

Brad Karp, Esquire (via Email)
Christopher C. Seeger, Esquire (via Email)
Bruce Birenboim, Esquire (via Email)
Scott George, Esquire (via Email)
Michael Rosenberg, Esquire (via Email)
Gene Locks, Esquire (via Email)